**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **In the Matter of** | ) | |
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| **A La Carte and Themed Tier Programming and Pricing Options for Programming Distribution on Cable Television and Direct Broadcast Satellite Systems** | ) ) ) ) | **MB Docket No. 04-207** |

# COMMENTS OF OXYGEN MEDIA CORPORATION

Oxygen Media Corporation (including its predecessors, "Oxygen") submits these comments in response to the Commission's Public Notice, DA 04-1454, released May 25, 2004, seeking information regarding a la carte and "themed-tier" carriage of programming services on cable television and direct broadcast satellite systems. Stripping advertiser-supported programming services from widely distributed tiers and relocating them to "themed tiers" or a la carte carriage would profoundly and adversely affect distribution, which is essential for programmers to obtain the financing necessary to develop and launch a network. It would also decrease advertising and subscriber fee revenues while substantially increasing costs, making it far more difficult for existing programmers to survive and virtually impossible to create and launch new programming services.

## The Oxygen Programming Service

Currently available in approximately 52 million households, Oxygen is a 24-hour cable programming service consisting primarily of information and entertainment programming directed at women. One of the few independently owned networks, Oxygen is the only television network in the country owned and operated by women. Founded in 1998 by Geraldine Laybourne, Oprah Winfrey, Marcy Carsey, Tom Werner and Caryn Mandabach, Oxygen launched its television network in 2000. Although some of its minority investors are involved in the cable or broadcast television business, Oxygen is controlled by the original founders and operates independently. Oxygen puts a fresh spin on television programming for young women, including more original programming than any other women's network. In short, Oxygen is the type of independent programming service that would be affected most directly and adversely by any government mandate promoting mini-tiers or a la carte carriage instead of carriage on broader and more-highly penetrated programming tiers.

From its launch in 2000, Oxygen has grown to serve over 52 million subscribers in less than five years. It has recent, direct experience in what it takes to develop, launch and grow an independent, advertiser-supported cable programming service in the current marketplace. Based on that experience, Oxygen believes that any government initiative to move advertiser-supported programming services from broad, popular programming tiers to mini-tiers or a la carte carriage would make it virtually impossible for independent programming services to compete with large programming conglomerates and broadcast-affiliated programmers. The inevitable result would be further consolidation in the programming industry and reduced diversity of viewpoints for consumers.

Launch Commitments Are Essential For Financing

In a world of mini-tiers and a la carte carriage, Oxygen would not exist. Financing is essential to the development of any new independent programming service, and carriage commitments are prerequisites to obtaining it. Oxygen was able to obtain a pre-launch commitment from Tele-Communications, Inc. (later AT&T Broadband) to carry Oxygen on cable systems serving seven million homes in the first two years of service after launch. The TCI commitment enabled Oxygen to obtain the first round of financing it needed to launch. It also helped Oxygen to obtain carriage commitments from other multichannel video programming distributors ("MVPDs"), so that within the first year of its launch, Oxygen had commitments for carriage to more than 20 million homes, which commitments in turn enabled Oxygen to secure additional rounds of financing. Oxygen's experience demonstrates that carriage on a popular service tier -- providing assurance of distribution to millions of homes -- is essential to obtain the financing necessary to develop and launch an independent programming service. Themed tier or a la carte carriage commitments from the same MVPDs would not have provided meaningful committed distribution, and financing would have been unavailable. Without such financing, Oxygen could not have been launched.

Tiered Carriage Provides Critical Exposure for Independent Programmers

Unlike new programming services spawned by broadcasters or programming conglomerates, independent programmers have no means to subsidize or cross-promote their service, or to offer consumers the opportunity to view the service (or any if its specific programs) on a sample or trial basis. For example, NBC, which owns Bravo, has been able to drive interest in that programming service through a variety of cross-promotions of the show "Queer Eye for the Straight Guy." NBC has aired the show, providing on opportunity for viewers to see it (and, if they enjoyed it, follow it on Bravo). The actors from the show also have appeared on the Tonight Show with Jay Leno and other NBC programs. NBC's current promotions for the Summer Olympics on its broadcast and multiple cable channels provide yet another example of this kind of cross-promotion. Broadcasters also have other tools, including the leverage of retransmission consent granted by the government, to promote affiliated programming services. Other media conglomerates can draw programming from existing libraries and cross-promote their services by running ads or promotions on affiliated programming services.

An independent programmer has no comparable way to subsidize its programming and marketing costs, to make consumers aware of its service, or to drive name recognition. It must rely on its own promotions and "drive-by" viewing or channel surfing. Carriage on a popular tier gives an independent programmer the benefits of the distributor's marketing of the tier and offers it the opportunity to promote the service through ads on the other cable channels. Absent tiered carriage, an independent programmer would have no reasonable means to induce consumers to make the initial purchase decision for the service a la carte or on a mini-tier, sight unseen.

Mini-Tier or A La Carte Carriage Would Greatly Reduce Advertising Revenues

As explained above, Oxygen initially focused its marketing efforts on potential distributors, gaining carriage commitments from MVPDs for as many households as possible. While we continue to seek additional distribution, we have focused even greater effort on advertising sales. Again, independent programmers already face significant hurdles in selling advertising time when compared to programming services that are affiliated with broadcasters or programming conglomerates. Government action that would require or promote mini-tier or a la carte carriage would only raise the bar still higher.

Although Oxygen now reaches 52 million homes, selling advertising time at competitive rates remains challenging. Despite the broad reach of our network, Oxygen still is not included in the television listings in many local newspapers and other publications. For example, USA Today does not include Oxygen in its television listings.

Nielsen will rate a network with 20 to 25 million subscribers, but the ratings data are unstable and of little use until the network reaches 45 to 50 million subscribers. Oxygen did not become "rated" until April 2003. For the first several years of our existence, Oxygen was not included in the Nielsen Daily ratings. During that period, we provided prospective advertisers with monthly or weekly ratings data, making it more difficult to sell advertising. Although it is very expensive for an independent programming network to subscribe to the Nielsen Daily rating service, Oxygen now does so because, among other things, media buyers rely heavily on these data.

In addition, ratings information is critical to advertising sales in the "Upfront Market," which typically accounts for the sale of the majority of a programmer's advertising inventory. Advertising sales in the "Upfront Market" are built on subscriber and ratings projections 12 to 15 months into the future. Consistent subscriber levels and rating trends enable a programmer to provide the estimates necessary to sell advertising time in the Upfront Market. If actual viewership is less than the guarantee, "upfront" agreements call for adjustments in the form of more inventory (referred to as "Audience Deficiency Units" or "ADUs") on the back-end. Thus, distribution on broad, popular service tiers provides the necessary subscriber counts to predict ratings more accurately, which helps a network participate in a successful upfront. In contrast, a la carte carriage is likely to lead to significantly greater monthly churn in subscribers making it almost impossible to estimate audience size far enough in advance to be able to take part in a successful upfront.[1]

The General Accounting Office recognized that any movement of advertiser supported programming services from popular service tiers to mini-tier or a la carte carriage "could result in a reduced amount that advertisers are willing to pay for advertising time because there would be a reduction in the number of viewers available to watch the networks." See

[1] For example, while broadcasters and cable programmers share the difficulty of predicting what shows will be popular with viewers in the upcoming season, broadcasters at least know how many households will be capable of receiving their programming services each season. A la carte or mini-tier carriage would add yet another variable in terms of the number of households capable of receiving the service.

United States General Accounting Office, "Telecommunications: Issues Related to Competition and Subscriber Rates in the Cable Television Industry," Report No. GAO-04-8 (rel. Oct. 24, 2003) ("GAO Report") at 35. Oxygen believes that this grossly underestimates the likely damage to advertising revenues and that changing from tiered carriage to mini-tiers or a la carte distribution would cripple our ability to generate advertising revenue. The harm resulting from a la carte carriage would extend far beyond a mere reduction in the number of viewers and the corresponding reduction in subscriber fees and advertising revenues and would directly affect the programmer's ability to provide the reliable ratings forecasts necessary to participate in the upfront market at all.

A La Carte Carriage Would Increase Marketing Costs

As set forth above, Oxygen's initial focus was on obtaining substantial carriage commitments from MVPDs. Thus, Oxygen's marketing efforts have been and continue to be focused on its distributors with periodic visits and marketing materials informing them of Oxygen's programming initiatives, expanded distribution, and ratings performance. Its distributors can then use this information in communicating with their subscribers and marketing the tiers in which Oxygen is carried. In a mini-tier or a la carte world, Oxygen would be required to devote significantly greater resources to marketing. Not only would Oxygen have to continue to market its service to distributors so that they launch it, but it also would have to sell its service directly to viewers, much like HBO, Showtime, and STARZ. In addition to new sales, Oxygen would have to try to "win back" customers who dropped the service each month as a result of inevitable subscriber churn. These greatly expanded marketing efforts would substantially increase Oxygen's marketing costs.

Reduced Revenues and Increased Costs Would Drive Up Subscriber Rates and Reduce Diversity

New networks such as Oxygen, however, could never afford to increase their marketing expenditures sufficiently to stem the loss of subscribers that would occur in an a la carte carriage environment. Those subscriber losses necessarily would reduce subscriber and advertising revenues. For example, Oxygen estimates that a 30% reduction in its existing subscriber base would yield at least a 50% reduction in advertising revenues for the reasons set forth above. On the cost side, marketing costs would increase substantially as an additional level of marketing to consumers would be required.

In order to compensate for those lost revenues and increased costs, Oxygen would have to increase its subscriber fees significantly and somehow reduce its costs to survive -- if survival were possible. Because Oxygen's largest category of expense is programming costs and, unlike networks affiliated with conglomerates, Oxygen is not in a position to draw on programming from any affiliates, cost reductions inevitably would reduce programming expenditures. This would naturally degrade the quality of the Oxygen programming service. Original programming, which is unfamiliar to consumers, and thus less effective at attracting new viewers in an a la carte environment, would bear the brunt of the expense reduction.

Thus, the viewer, who is supposed to be the beneficiary of a la carte carriage, would be the loser. Consumers will end up:

- paying more for each network;
- choosing among networks with diminished programming quality; and
- having fewer network choices.

The GAO correctly surmised that at least some portion of the increase in monthly network license fees would be passed through to the consumer. See GAO Report at 6 ("to compensate for the decline in advertising revenue, cable networks may also raise the license fees charged to cable operators for the right to carry the networks…[and] some of the increase is likely to be passed on to subscribers.”).

## Conclusion

Mandatory mini-tiers or a la carte carriage clearly would harm independent programmers such as Oxygen. New launches would be impossible, and the survival of existing programming services would be doubtful. Viewers would pay higher fees to cover reduced advertising revenues and increased marketing costs and in return, they would have fewer networks to watch and receive lower quality programming as networks cut their programming costs to compensate for lost revenues. The only potential beneficiaries of a la carte carriage would be broadcasters (who already enjoy government-mandated must-carry or retransmission consent) and media conglomerates with further industry consolidation. An a la carte mandate would gravely threaten the survival of many networks, particularly recently-launched networks, and would assure that consumers are permanently deprived of seeing new networks created by independent entrepreneurs.

Respectfully submitted

OXYGEN MEDIA CORPORATION

By: ________/S/______________

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